The National Labor Relations Act: Background and Selected Topics

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Summary

The National Labor Relations Act (NLRA or "the Act") recognizes the right of employees to engage in collective bargaining through representatives of their own choosing. By "encouraging the practice and procedure of collective bargaining," the Act attempts to mitigate and eliminate labor-related obstructions to the free flow of commerce. Although union membership has declined dramatically since the 1950s, congressional interest in the NLRA remains significant. In the 112th Congress, over 30 bills have been introduced to amend the NLRA. Some of these bills address the timing of union representation elections, while others are concerned with varying aspects of the NLRA, such as the activities of the National Labor Relations Board (NLRB), which implements and administers the Act.

Since the NLRA's enactment in 1935, the NLRB and the courts have considered a variety of issues arising under the Act. This report reviews selected decisions of the NLRB and the courts on three of them. Determining when an employee may be deemed a supervisor for purposes of coverage under the Act is important because the right to engage in collective bargaining is extended only to employees under the NLRA. Employees who are properly classified as supervisors are not afforded collective bargaining rights.

Both employers and unions are prohibited from restraining or coercing employees in the exercise of the rights guaranteed to them under the Act. In general, to determine whether an unfair labor practice has been committed by either an employer or union, a reviewing court asks whether the misconduct "reasonably tends" to restrain or coerce employees in the exercise of their rights under the NLRA. Courts have emphasized that the actual effect of the misconduct is immaterial.

Finally, pre-election communication with employees may influence the outcome of a representation election. While the NLRA does prohibit an employer from interfering with an employee's collective bargaining rights, decisions discussed in this report indicate that an employer does not violate the Act in all cases when it denies a union access to its property.

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The National Labor Relations Act (NLRA or "the Act") recognizes the right of employees to engage in collective bargaining through representatives of their own choosing. By "encouraging the practice and procedure of collective bargaining," the Act attempts to mitigate and eliminate labor-related obstructions to the free flow of commerce.[1] Although union membership has declined dramatically since the 1950s, congressional interest in the NLRA remains significant.[2] In the 112th Congress, over 30 bills have been introduced to amend the NLRA. Some of these bills address the timing of union representation elections, while others are concerned with varying aspects of the NLRA, such as the activities of the National Labor Relations Board (NLRB), which implements and administers the Act.

Since the NLRA's enactment in 1935, the NLRB and the courts have considered a variety of issues arising under the Act. This report reviews selected decisions of the NLRB and the courts that involve topics that continue to be relevant for employers and unions during the collective bargaining process.

Coverage Under the NLRA

The right to engage in collective bargaining under the NLRA does not apply to all individuals employed by an employer.[3] Rather, the right extends only to "employees." Section 2(3) of the NLRA states that an employee "shall include any employee ... but shall not include any individual ... employed as a supervisor."[4] An employee's job title does not determine whether an individual is a supervisor for purposes of the NLRA. Instead, the term "supervisor" is defined by the Act to include any individual with the authority to perform any one of 12 specified functions, if the exercise of such authority requires the use of independent judgment and is not merely routine or clerical.

Section 2(11) of the NLRA states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[5]

Because the 12 functions and the term "independent judgment" are not further defined, the NLRB and U.S. Supreme Court have sought to provide meaning to this language.

In *NLRB v. Kentucky River Community Care, Inc*., the Court considered whether certain nurses should be classified as supervisors for purposes of the NLRA when their judgment was informed by professional or technical training or experience.[6] Kentucky River Community Care, the

[1] *See* 29 U.S.C. §151.

[2] *See* Bureau of Labor Statistics, U.S. Dept. of Labor, *Union Members – 2011* (Jan. 27, 2012), *available at* http://www.bls.gov/news.release/pdf/union2.pdf (identifying the union membership rate for private sector workers in 2011 as 11.8 percent). *See also* Steven Greenhouse, *Union Membership Rate Fell Again in 2011*, N.Y. Times, Jan. 28, 2012, at B3 ("In the 1950s, more than 35 percent of private sector workers were in unions.").

[3] For additional information on coverage under the National Labor Relations Act, *see* CRS Report RL34350, *The Definition of "Supervisor" Under the National Labor Relations Act*, by Gerald Mayer and Jon O. Shimabukuro.

[4] 29 U.S.C. §152(3).

[5] 29 U.S.C. §152(11).

[6] 532 U.S. 706 (2001).

operator of a care facility for individuals with mental retardation and illness, sought to exclude six registered nurses (RNs) from a bargaining unit on the grounds that they were supervisors. The NLRB concluded that the nurses were not supervisors because they failed to exercise sufficient independent judgment. According to the NLRB, the nurses used "ordinary professional or technical judgment" in directing less-skilled employees to deliver services in accordance with employer-specified standards.[7] The U.S. Court of Appeals for the Sixth Circuit rejected the NLRB's position, and the Court ultimately affirmed the Sixth Circuit's decision.

The *Kentucky River* Court understood section 2(11) of the NLRA to set forth a three-part test for determining supervisory status. Employees will be considered supervisors if (1) they hold the authority to engage in any one of the twelve supervisory functions identified in section 2(11) of the NLRA; (2) their exercise of authority is not of a "merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held in the interest of the employer.[8] At issue in *Kentucky River*, was the second part of the test. Although the Court recognized the NLRB's discretion to clarify the meaning of the term "independent judgment," it maintained that it was inappropriate for the NLRB to characterize judgment that reflects "ordinary professional or technical judgment" as failing to be independent judgment.

The Court believed that the NLRB's reference to "ordinary or technical judgment" established a "startling categorical exclusion" that was not suggested by the NLRA's statutory text.[9] The Court observed:

> What supervisory judgment worth exercising, one must wonder, does not rest on 'professional or technical skill or experience?' If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate 'supervisors' from the Act.[10]

In addition, the Court indicated that it was unaware of any NLRB decision that concluded that a supervisor's judgment ceased to be independent judgment because it depended on the supervisor's professional or technical training or experience.[11] The Court maintained that when an employee exercises one of the functions identified in section 2(11) with judgment that possesses a sufficient degree of independence, the NLRB "invariably finds supervisory status."[12]

Four justices dissented from the majority's position on independent judgment.[13] The dissent maintained that the NLRB's interpretation of independent judgment was fully rational and consistent with the NLRA. The dissent noted: "The term 'independent judgment' is indisputably ambiguous, and it is settled law that the NLRB's interpretation of ambiguous language in the [NLRA] is entitled to deference.[14]

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[7] *Id.* at 713.

[8] *Id.* (quoting 29 U.S.C. §152(11)).

[9] Kentucky River Community Care, 532 U.S. at 714.

[10] *Id.* at 715.

[11] *Id.* at 716.

[12] *Id.*

[13] Justice Stevens filed an opinion, joined by Justices Souter, Ginsburg, and Breyer, that dissented from the majority opinion on the question of independent judgment. However, Justice Stevens' opinion concurred with the majority opinion on the question of which party bears the burden of proving or disproving an employee's supervisory status in an unfair labor practice proceeding.

[14] Kentucky River Community Care, 532 U.S. at 725-26.

In 2006, the NLRB revisited the issue of supervisory status in *Oakwood Healthcare, Inc*.[15] Oakwood Healthcare employed approximately 181 RNs in 10 patient care units at an acute care hospital. Many of these nurses served as charge nurses who were responsible for overseeing their patient care units and assigning other RNs, technicians, and medical personnel on their shifts. Some of the RNs worked permanently as charge nurses, while others rotated into the charge nurse position. Oakwood Healthcare sought to exclude both the permanent and the rotating charge nurses from a proposed bargaining unit on the grounds that they were supervisors within the meaning of section 2(11). Oakwood Healthcare maintained that the charge nurses were supervisors because they "used independent judgment in assigning and responsibly directing employees."[16]

The NLRB viewed *Oakwood Healthcare, Inc*. as an opportunity to define the terms "assign," "responsibly to direct," and "independent judgment" as they are used in section 2(11) of the NLRA.[17] With each term, the NLRB considered the language used by Congress, as well as the NLRA's legislative history, applicable policy considerations, and Supreme Court precedent.[18] The NLRB concluded that the term "assign" should be construed to refer to the act of designating an employee to a place (such as a location or department), appointing an employee to a time, or giving significant overall duties or tasks to an employee.[19] The NLRB noted that in the health care setting, the term "encompasses the charge nurses' responsibility to assign nurses and aides to particular patients."[20] The term would not apply, however, to an individual who simply chooses the order in which an employee will perform discrete tasks within an assignment.

Citing the legislative history of section 2(11), the NLRB interpreted the term "responsibly to direct" to apply to individuals who not only oversee the work being performed, but are held responsible if the work is done poorly or not at all. The NLRB observed:

> [F]or direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. This interpretation of 'responsibly to direct' is consistent with post-*Kentucky River* Board decisions that considered an accountability element for 'responsibly to direct.'[21]

According to the NLRB, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action.[22] The possibility of adverse consequences for the putative supervisor must also be established.

With regard to the term "independent judgment," the NLRB maintained that at a minimum an individual must act or effectively recommend action that is "free of the control of others and form

[15] 348 NLRB 686 (2006).

[16] *Id*. at 687.

[17] *Id*. at 688 ("Thus, exercising our discretion to interpret ambiguous language in the Act, and consistent with the Supreme Court's instructions in *Kentucky River*, we herein adopt definitions for the terms 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act.").

[18] *See* Oakwood Healthcare, 348 NLRB at 688-89.

[19] Oakwood Healthcare, 348 NLRB at 689.

[20] *Id*.

[21] Oakwood Healthcare, 348 NLRB at 691-92.

[22] Oakwood Healthcare, 348 NLRB at 692.

an opinion or evaluation by discerning and comparing data."[23] The NLRB further elaborated that a judgment is not independent if it is dictated or controlled by detailed instructions in company policies, the verbal instructions of a higher authority, or the provisions of a collective bargaining agreement.[24] The NLRB sought to interpret the term "independent judgment" in light of the phrase "not of a merely routine or clerical nature," which appears before "independent judgment" in section 2(11). The NLRB stated:

> If there is only one obvious and self-evident choice ... or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.[25]

Applying the new definitions for the terms "assign," "responsibly to direct," and "independent judgment," the NLRB concluded that 12 permanent charge nurses assigned to five of the 10 patient care units were supervisors for purposes of the NLRA. The NLRB declined to find that any of the charge nurses responsibly directed other employees. The NLRB noted that the charge nurses were not subject to discipline or lower evaluations if employees who were subject to the nurses failed to adequately performed their tasks. However, in five of the 10 patient care units, the NLRB found that the charge nurses did assign employees within the meaning of the NLRA. These nurses assigned employees to patients and assigned overall tasks to the employees. The charge nurses in the five units were unlike emergency room charge nurses who simply placed staff in geographic areas within the emergency room.

The NLRB determined that the 12 charge nurses exercised independent judgment in accordance with section 2(11). The charge nurses made assignments in light of the skill sets of employees and the nursing time patients would require on a given shift. The NLRB noted that the "process of equalizing work loads at the hospital involves independent judgment."[26] While Oakwood Healthcare maintained a written policy for assigning nursing personnel to deliver care to patients, the NLRB observed that charge nurses were given considerable latitude in making decisions on how to assign nursing personnel. Ultimately, the NLRB concluded that when a charge nurse makes an assignment based on the skill, experience, and temperament of nursing personnel and the patients, that nurse has "exercised the requisite discretion to make the assignment a supervisory function 'requir[ing] the use of independent judgment.'"[27]

Unfair Labor Practices and Interference With Collective Bargaining

In addition to recognizing the right of employees to engage in collective bargaining, the NLRA prohibits certain misconduct by both employers and unions that interferes with that right. Section 8(a)(1) of the Act states that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[28] Similarly,

[23] Oakwood Healthcare, 348 NLRB at 693.

[24] *Id.* The NLRB did indicate that the mere existence of company policies would not eliminate independent judgment from decision-making if the policies allow for discretionary choices.

[25] Oakwood Healthcare, 348 NLRB at 693.

[26] Oakwood Healthcare, 348 NLRB at 697.

[27] Oakwood Healthcare, 348 NLRB at 698.

[28] 29 U.S.C. §158(a)(1). Section 7 of the NLRA, 29 U.S.C. §157, recognizes the right of employees to engage in collective bargaining.

section 8(b)(1)(A) of the NLRA provides that it shall be an unfair labor practice for a labor organization or its agents to "restrain or coerce ... employees in the exercise of the rights guaranteed in section 7 ..."[29]

Although the NLRB has suggested in the past that Congress did not intend for section 8(b)(1)(A) to be given the broad application sometimes accorded to section 8(a)(1), section 8(b)(1)(A) appears to be viewed generally as a counterpart to section 8(a)(1).[30] Indeed, in *Capital Service, Inc. v. NLRB*, a 1953 case involving a union boycott of goods manufactured by employees who resisted unionization, the U.S. Court of Appeals for the Ninth Circuit observed that it was "inconceivable" that the NLRA "intended the identical words 'restrain or coerce' of 8(a)(1) and 8(b)(1) to have a different meaning when applied to a labor organization from that when applied to an employer."[31]

To determine whether an unfair labor practice has been committed under either subsection, a reviewing court asks the same question: whether the misconduct "reasonably tends" to restrain or coerce employees in the exercise of their rights under the NLRA.[32] Courts have emphasized that the actual effect of the misconduct is immaterial. In *Int'l Union of Operating Engineers, AFL-CIO v. NLRB*, a 1964 case involving picketing and the right of employees to refrain from union activities, the Third Circuit maintained: "That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective."[33]

Section 8(a)(1) of the NLRA prohibits not only the use or threatened use of violence against an employee for exercising his rights under section 7 of the Act, but also verbal threats to adversely affect an employee's employment status or working conditions.[34] In *NLRB v. Gissel Packing Co., Inc*., the Supreme Court explained:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.[35]

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[29] 29 U.S.C. §158(b)(1)(A).

[30] *See* THE DEVELOPING LABOR LAW 90 (John E. Higgins et al. eds., 2006).

[31] 204 F.2d 848 (9th Cir. 1953), *aff'd*, 347 U.S. 501 (1954).

[32] *Compare* Presbyterian/St. Luke's Medical Center v. NLRB, 723 F.2d 1468, 1472 (10th Cir. 1983) ("The test for violations of section 8(a)(1) is not whether an attempt at coercion has succeeded or failed, but 'whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of their section 7 rights.'"), *and* Local 542, Int'l Union of Operating Engineers, AFL-CIO v. NLRB, 328 F.2d 850, 852-53 (3rd Cir. 1964) ("The Union urges in support of its argument that the episodes 'had no effect upon the operation of the employer's business, and they coerced or intimidated no one.' ... The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.").

[33] Int'l Union of Operating Engineers, 328 F.2d at 852.

[34] *See* THE DEVELOPING LABOR LAW at 185-86 (discussing section 8(a)(1) of the NLRA and employer violence). *See also* Teamsters Local Union No. 171 v. NLRB, 863 F.2d 946, 952-53 (D.C. Cir. 1988) (describing various acts of misconduct that violate section 8(a)(1), including threatening to close a facility if employees select a union as their collective bargaining representative, and threatening to discharge employees for engaging in union activities).

[35] 395 U.S. 575, 618 (1969).

Whether an employer's communication to its employees constitutes an unlawful threat for purposes of section 8(a)(1) is generally fact-specific and requires consideration of the totality of the circumstances. The *Gissel* Court noted that any assessment of the precise scope of employer expression "must be made in the context of its labor relations setting" and must take into account the economic dependence of the employees on their employers.[36]

An employer's interrogation of its employees as to union sympathy and affiliation may also violate section 8(a)(1) of the Act because such an interrogation has a "natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained."[37] In *Blue Flash Express, Inc*., the NLRB indicated that it would consider five factors when determining whether an interrogation reasonably tends to restrain or interfere with the exercise of rights guaranteed by the NLRA: the timing of the interrogation; the place of the interrogation; the information sought during the interrogation; the identity of the interrogator; and the employer's conceded preference with respect to the subject of the interrogation.[38] Using these factors, the Board found a violation of section 8(a)(1) when an employer interrogated an employee after a performance review, despite resistance by the employee.[39] The Board also found a violation when an interrogation was conducted by a high-level supervisor, without a legitimate purpose, and without any assurances against reprisals.[40]

The use or threatened use of violence by a union or one of its agents is similarly considered an unfair labor practice under section 8(b)(1)(A) of the NLRA.[41] Other acts by unions have been found to violate section 8(b)(1)(A), including encouraging employees to quit their jobs because they were not members of the union, and threatening discharge for failure to sign union authorization cards.

In *Local Union No. 697 (UE & C Catalytic, Inc.)*, the NLRB found a violation of section 8(b)(1)(A) when a local union engaged in a pattern of misconduct to get members of other unions employed at an Amoco refinery, identified as "travelers," to abandon their jobs because they were not members of the local union and because a large number of local members were out of work.[42] The pattern of misconduct included repeated requests and suggestions that the travelers quit their jobs and volunteer for layoffs. The local also devised a credentialing system just for the travelers and refused to renew some of the credentials. The NLRB concluded that the local's efforts were coercive and meant to intimidate the travelers into leaving the refinery: "It wanted the travelers to leave the Amoco jobsite because they were not members of [the local] and because members were out of work."[43]

The NLRB has indicated that section 8(b)(1)(A) "broadly interdicts any union conduct threatening job security of employees because of the employees' refusal or failure to abide by union membership conditions."[44] By telling employees that they must sign a union authorization

[36] *Id*. at 617.

[37] NLRB v. West Coast Casket Co., Inc., 205 F.2d 902, 904 (9th Cir. 1953).

[38] 109 NLRB 591 (1954).

[39] *See* Litton Systems, 300 NLRB 324 (1990).

[40] *See* North Hills Office Services, Inc., 344 NLRB 1083 (2005).

[41] *See* Teamsters Local 115 (Kurz-Hastings, Inc.), 344 NLRB 644 (2005). *See also* THE DEVELOPING LABOR LAW at 274-76 (discussing section 8(b)(1)(A) of the NLRA and employer violence).

[42] 318 NLRB 443 (1995).

[43] *Id*. at 446.

[44] United Stanford Employees, Local 680, 232 NLRB 326, 329 (1977).

card or be subject to termination, a union makes "an implied threat of reprisal calculated to interfere with the employees' statutory right to refrain from any and all union activities."[45]

Unions have been found to violate section 8(b)(1)(A) by engaging in other misconduct, including attempting to cause an employer to discharge employees because they opposed the union leadership, refusing to refer dissident union members for jobs, and threatening employees with the loss of employment if they contested a union election.[46]

Pre-Election Communication with Employees

While section 8(a)(1) of the NLRA does prohibit an employer from interfering with the right of employees to engage in collective bargaining, the NLRB has long maintained that an employer may make antiunion, but noncoercive, speeches to their employees on company time and on company property without allowing a union an equal opportunity to reply. In *Livingston Shirt Corp*., the NLRB noted:

> [W]e find nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views. On the contrary, an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees. We do not believe that unions will be unduly hindered in their right to carry on organizational activities by our refusal to open up to them the employer's premises for group meetings, particularly since this is an area from which they have traditionally been excluded, and there remains open to them all the customary means for communicating with employees.[47]

Last-minute speeches made by employers, however, have been distinguished from other pre-election speeches. In *Peerless Plywood Co*., decided the same day as *Livingston Shirt*, the NLRB declared that employers and unions are prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before an election.[48] The NLRB maintained that such speeches interfere with a free election by creating a "mass psychology which overrides arguments made through other campaign media and giv[ing] an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word."[49]

In 1956, the Court considered whether an employer could prohibit the distribution of union literature on its company-owned parking lots by nonemployee union organizers. In *NLRB v. Babcock & Wilson Co*., the employer contended that it had a consistent policy against all pamphleteering and that it was not attempting to impede its employees' collective bargaining rights when it restricted the distribution of union literature on company property.[50] The Court maintained an employer cannot be compelled to allow the distribution of union literature on its premises if a union can reach employees through other channels of communication. If, however, the employer's location and the employees' residences place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to

[45] *Id*. *See also* Lockheed Martin Tactical Aircraft Systems, 331 NLRB 1407 (2000) (affirming Administrative Law Judge's finding that a union violated section 8(b)(1)(A) by telling employees who were reclassified into positions that fell within an existing bargaining unit that they would be discharged if they failed to sign authorization cards).

[46] S*ee* 1-5 Nat'l Lab. Rel. Act: Law & Prac. (MB) §5.11.

[47] 107 NLRB 400, 406 (1953).

[48] 107 NLRB 427 (1953).

[49] *Id*. at 429.

[50] 351 U.S. 105 (1956).

approach its employees on its property. In *Babcock*, the Court ultimately found that the employer's restrictions were permissible because its plants were close to the communities where a large percentage of employees lived, and various methods of communication were available to the union.

In *Lechmere v. NLRB*, a 1992 case involving the efforts of the United Food and Commercial Workers Union, AFL-CIO, to organize employees at a retail store, the Court reaffirmed its holding in *Babcock*.[51] Rejecting the NLRB's conclusion that there were no reasonable, alternative means for the union to communicate with Lechmere's employees, the Court emphasized that *Babcock* requires access to an employer's property only when the employer's location and the employees' residences place the employees beyond the reach of reasonable union efforts to communicate with them. The Court identified logging camps, mining camps, and mountain resort hotels as "classic examples" where union access would be permitted.[52] The Court further noted that the union has the heavy burden of establishing employee isolation and showing that no other reasonable means of communicating with employees exists.[53] As in *Babcock*, the Court in *Lechmere* found that the union did have reasonable access to the retail employees and that this accessibility was suggested by the union's success in contacting a substantial percentage of them directly via mailings, phone calls, and home visits.[54]

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[51] 502 U.S. 527 (1992).

[52] *Id.* at 539-40.

[53] *Id.* at 540.

[54] *Id.*